

Respondent argues that the ALJ exceeded his jurisdiction in ordering TTD in the November 14, 2008, Order, as the ALJ had earlier denied TTD to claimant in an

Order dated September 11, 2008, and the ALJ held no additional preliminary hearing in the interim.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the November 14, 2008, preliminary hearing Order should be reversed in part and affirmed in part.

Claimant suffered an accidental injury on October 29, 2007, when she tripped in a parking lot while making a delivery for respondent. The compensability of this injury is not disputed by respondent.

Claimant was originally awarded TTD in an Order dated April 9, 2008. However, a dispute arose as to whether respondent had accommodated work available to claimant within her restrictions. Claimant returned to work for respondent, but contended that she had been subjected to verbal abuse at work and was forced to quit the accommodated work after May 8, 2008. The matter proceeded to preliminary hearing on September 11, 2008, with claimant requesting TTD, unauthorized medical expense reimbursement and additional treatment as authorized by Lee R. Dorey, M.D.

At the preliminary hearing, claimant acknowledged that she had spent the last three days helping at the State Fair in Hutchinson, Kansas, taking tickets at the gate. This was a paying job. Claimant also acknowledged that respondent had offered her work within her restrictions but that claimant had refused the offer. Additionally, when claimant filed for unemployment, she was provided a letter from respondent which again offered accommodated work within the restrictions of Paul S. Stein, M.D. The letter, dated May 30, 2008, required that claimant report to work for respondent by June 4, 2008. Claimant acknowledged that she did not contact respondent, nor did she advise her attorney, who had been copied on the letter, to contact respondent. Claimant then received a second letter dated June 10, 2008, terminating her employment. When claimant requested unemployment, the benefits were denied due to claimant having left respondent's employment voluntarily. At the end of the preliminary hearing, the ALJ awarded claimant the unauthorized medical expense and determined that claimant should be referred to Dr. Douglas Burton for an IME. Additional TTD was denied, as claimant was found to have been offered accommodated work and she never went back to respondent, nor did she respond to respondent's offers of an accommodated job.

The ALJ issued an Order dated September 11, 2008, denying claimant the requested TTD but granting the unauthorized medical expense and finding "[a]n IME with Dr. Douglas Burton will be Ordered under separate Order". The ALJ then issued a

subsequent Order dated September 12, 2008, referring claimant to Dr. Burton for an IME. The Order of September 12, 2008, concluded with the following:

Claimant's preliminary hearing requests are taken under advisement pending an IME report from Dr. Burton. Counsel will have seven (7) days after receipt of the IME report to offer their written arguments/comments with respect to Claimant's preliminary hearing requests or to request further evidentiary hearing. If no written comments or request for hearing are received, the Court will proceed to enter an Order".

An IME instruction letter to Dr. Burton, of the Dickson-Diveley Midwest Orthopaedic Clinic, P.A., was issued by the Court on September 12, 2008. An IME report dated October 27, 2008, from Stanley A. Bowling, M.D., also of the Dickson-Diveley Clinic, was provided to the ALJ, with copy to counsel of record. Upon receipt of the IME report, and without benefit of any additional hearing, the ALJ issued an Order dated November 14, 2008, requiring respondent to provide claimant the names of three qualified physicians from which claimant was to designate an authorized physician. The ALJ also ordered TTD at the rate of \$240.00 per week from July 16, 2008, until claimant is released to return to work, has been offered accommodated work within her temporary restrictions, has attained maximum medical improvement, or until further Order of the Court. The ALJ then issued an Order dated January 7, 2009, terminating the TTD as of that date, finding that the "Court's Order of November 14, 2008, was entered in error".

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

K.S.A. 44-534a grants the administrative law judge the authority to determine a claimant's request for temporary total disability and ongoing medical treatment at a preliminary hearing. The Board's review of preliminary hearing orders is limited to specific issues as set forth in the statute.

¹ K.S.A. 2007 Supp. 44-501 and K.S.A. 2007 Supp. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

Not every alleged error in law or fact is reviewable from a preliminary hearing order. The Board's jurisdiction to review preliminary hearing orders is generally limited to the following issues which are deemed jurisdictional:

1. Did the worker sustain an accidental injury?
2. Did the injury arise out of and in the course of employment?
3. Did the worker provide timely notice and written claim of the accidental injury?
4. Is there any defense that goes to the compensability of the claim?³

K.S.A. 44-534a(a)(1)(2) states:

(a) (1) After an application for a hearing has been filed pursuant to K.S.A. 44-534 and amendments thereto, the employee or the employer may make application for a preliminary hearing, in such form as the director may require, on the issues of the furnishing of medical treatment and the payment of temporary total disability compensation. At least seven days prior to filing an application for a preliminary hearing, the applicant shall give written notice to the adverse party of the intent to file such an application. Such notice of intent shall contain a specific statement of the benefit change being sought that is to be the subject of the requested preliminary hearing. If the parties do not agree to the change of benefits within the seven-day period, the party seeking a change in benefits may file an application for preliminary hearing which shall be accompanied by a copy of the notice of intent and the applicant's certification that the notice of intent was served on the adverse party or that party's attorney and that the request for a benefit change has either been denied or was not answered within seven days after service. Copies of medical reports or other evidence which the party intends to produce as exhibits supporting the change of benefits shall be included with the application. The director shall assign the application to an administrative law judge who shall set the matter for a preliminary hearing and shall give at least seven days' written notice by mail to the parties of the date set for such hearing.

(2) Such preliminary hearing shall be summary in nature and shall be held by an administrative law judge in any county designated by the administrative law judge, and the administrative law judge shall exercise such powers as are provided for the conduct of full hearings on claims under the workers compensation act. Upon a preliminary finding that the injury to the employee is compensable and in accordance with the facts presented at such preliminary hearing, the administrative law judge may make a preliminary award of medical compensation and temporary total disability compensation to be in effect pending the conclusion of a full hearing

³ K.S.A. 44-534a(a)(2).

on the claim, except that if the employee's entitlement to medical compensation or temporary total disability compensation is disputed or there is a dispute as to the compensability of the claim, no preliminary award of benefits shall be entered without giving the employer the opportunity to present evidence, including testimony, on the disputed issues. A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. If an appeal from a preliminary order is perfected under this section, such appeal shall not stay the payment of medical compensation and temporary total disability compensation from the date of the preliminary award. If temporary total compensation is awarded, such compensation may be ordered paid from the date of filing the application, except that if the administrative law judge finds from the evidence presented that there were one or more periods of temporary total disability prior to such filing date, temporary total compensation may be ordered paid for all periods of temporary total disability prior to such date of filing. The decision in such preliminary hearing shall be rendered within five days of the conclusion of such hearing. Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.⁴

K.S.A. 2008 Supp. 44-551(i)(2)(A) states:

(2) (A) If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. Such an appeal from a preliminary award may be heard and decided by a single member of the board. Members of the board shall hear such preliminary appeals on a rotating basis and the individual board member who decides the appeal shall sign each such decision. The orders of the board under this subsection shall be issued within 30 days from the date arguments were presented by the parties.⁵

K.S.A. 44-534a grants an administrative law judge the power to determine issues relating to medical treatment and TTD. Here, the ALJ made those determinations in his Orders of September 11 and September 12, 2008. TTD was denied claimant and a referral for an IME was ordered. It was also clear that the ALJ intended to proceed with the medical request upon receipt of the IME report. There was no such intent with regard to the TTD. That issue had been determined in the September 11, 2008, Order and no

⁴ K.S.A. 44-534a(a)(1) and (2).

⁵ K.S.A. 2008 Supp. 44-551(i)(2)(A).

additional consideration was contemplated, as was clear at the preliminary hearing of September 11, 2008, and in the Order of that same date.

While the ALJ is empowered to determine issues dealing with medical treatment and TTD, the ALJ is also required to provide the parties with the appropriate due process in reaching those determinations. K.S.A. 44-534a requires an opportunity be given the parties to present evidence on disputed issues before a determination is made on those issues. The ALJ granted the parties the opportunity to dispute claimant's need for ongoing medical treatment upon receipt of the IME report. No such opportunity was granted respondent before the ALJ issued the November 14, 2008, Order for TTD. The Board's jurisdiction to review preliminary orders is limited by K.S.A. 44-534a. However, the Board can also review whether an administrative law judge exceeded his or her jurisdiction in granting or denying the relief requested at the preliminary hearing. Here, the ALJ failed to protect respondent's due process right to present evidence on the issue of claimant's entitlement to TTD before the Order of November 14, 2008, was issued. As such, the ALJ exceeded his jurisdiction in issuing the Order and same must be reversed. As noted above, the ALJ recognized the error in his Order of January 7, 2009.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2008 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

The Order of November 14, 2008, granting claimant additional TTD is reversed. The remainder of the Order granting claimant ongoing medical treatment remains in full force and effect.

DECISION

WHEREFORE, it is the finding, decision, and order of this Appeals Board Member that the Order of Administrative Law Judge Bruce E. Moore dated November 14, 2008, should be, and is hereby, reversed with regard to the order for TTD, but remains in full force and effect with regard to claimant's entitlement to ongoing medical treatment.

⁶ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this ____ day of February, 2009.

HONORABLE GARY M. KORTE

c: Mitchell W. Rice, Attorney for Claimant
Scott J. Mann, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge